1-2008

Restitution

Tiong Min YEO
Singapore Management University, tmyeo@smu.edu.sg

20. RESTITUTION

YEO Tiong Min
LLB (Hons) (National University of Singapore), BCL, DPhil (Oxford); Advocate and Solicitor (Singapore);
Yong Pung How Professor of Law, Singapore Management University, School of Law.

Introduction

20.1 In the year under review, there was one major decision from the Singapore Court of Appeal dealing with the relationship between the punitive legislative framework and the common law restitutionary claim by a principal against a bribed agent. In addition, several important issues on the shape of the law of restitution in Singapore received some airing in a number of cases. The three most significant issues related to the law on the recovery of contractual deposits, the nature and structure of the claim commonly called "knowing receipt", the defence of change of position and the related potential defence of change of circumstances.

Contractual allocation of risks

20.2 Appeals from *Firstlink Energy Pte Ltd v Creanovate Pte Ltd* [2007] 1 SLR 1050 were dismissed by the Court of Appeal. The trial judge's decision on the issue of total failure of consideration (discussed in (2006) 7 SAL Ann Rev 397 at paras 20.2–20.3) was affirmed by the Court of Appeal which concurred with the trial judge's findings and decision (*Creanovate Pte Ltd v Firstlink Energy Pte Ltd* [2007] 4 SLR 780 at [31]).

20.3 In *Rabiah Bee bte Mohamed Ibrahim v Salem Ibrahim* [2007] 2 SLR 655, the High Court dealt extensively with the distinction between the contractual and the restitutionary *quantum meruit*. The case arose out of a falling out between two siblings. The plaintiff had agreed with her brother the defendant jointly to enter the property market in Greater London through the purchase and refurbishment of residential properties for rent or sale through a number of joint-venture holding companies. Amongst a myriad of claims and counterclaims, the plaintiff had claimed for reasonable remuneration for her efforts in maintaining and managing the properties in London in accordance with an implied term in the contract with the defendant. Judith Prakash J explained (at [123]):

> Where there is an express or implied contract which states that there should be remuneration but does not fix the quantum, the claim in

> *quantum meruit* will be contractual in nature. Where, however, the basis of the claim is to correct the otherwise unjust enrichment of the defendant, it is restitutionary in nature.

20.4 The judge further pointed out that there could not be a claim in *quantum meruit* if there exists a contract for an agreed sum and that there could not be a claim in restitution parallel to an inconsistent contractual promise between the parties (at [123]).

20.5 The court held that the claim succeeded based on an implied term in the contract for remuneration. The *quantum meruit* claim, therefore, succeeded on the contractual basis (at [126]). There was, therefore, no need to deal with the restitutionary *quantum meruit* as such. As far as this claim went, the defendant had argued that the restitutionary claim could not succeed in any event because the claim could only be made if the contract was terminated prematurely as a result of the breach of the party against whom the claim was made, and that on the present facts, the contract had been terminated by mutual agreement and not by breach. The court observed that this was a "strong point", but noted that there could be circumstances where even a mutual termination results in one party unfairly suffering loss, which could found a restitutionary claim (at [127]).

20.6 In principle, it should not matter how the contract was terminated. For example, a contract terminated automatically by operation of law under the doctrine of frustration does not prevent restitutionary recovery (now modified under the Frustrated Contracts Act (Cap 115, 1985 Rev Ed)). Where a contract is terminated by mutual agreement, the parties may also have agreed on the restitutionary consequences (including the possibility that no restitutionary consequences should follow). This could be the "strong point", but in the absence of any such contractual agreement, the normal restitutionary consequences ought to follow. The context of the defendant's argument suggests that the "strong point" could be a reference to the general reluctance of the courts to grant *quantum meruit* remedy to a party in breach of contract (*Sumpter v Hedges* [1898] 1 QB 673). This may, however, be contrasted with the more liberal judicial approach to allow the party in breach to recover money paid out on the basis of total failure of consideration (*Rover International v Cannon Film Sales Ltd* [1989] 1 WLR 912 and *Dies v British and International Mining and Finance Corp* [1939] 1 KB 724, both cited with approval though distinguished on the facts in *Energy Shipping Co Ltd v UDL Shipping (Singapore) Pte Ltd* [1995] 3 SLR 25 (CA) at [36]–[40]. See also *Mayson v Clouet* [1924] 1 AC 980 (PC Singapore)).

20.7 Perhaps more interesting is the observation that in appropriate cases, the *loss* suffered by the party in breach could be the foundation of

a restitutionary claim. The court had earlier observed that the restitutionary *quantum meruit* claim was based on correcting the unjust *enrichment* of the innocent party to the contract. This probably highlights the *subtractive* nature of this type of restitutionary claim, *ie*, the enrichment was at the expense of (*ie*, loss suffered by) the party in breach, although it could also possibly refer to an *alternative* basis to the law of unjust enrichment, focussing instead on the efforts of the party conferring the benefit as the foundation of the claim. Some have argued, for example, for a principle of unjust reliance (J Beatson, "Benefit, Reliance and the Structure of Unjust Enrichment" in *Use and Abuse of Unjust Enrichment* (Oxford University Press, 1991) ch 2) or unjust sacrifice (S Stoljar, "Unjust Enrichment and Unjust Sacrifice" (1987) 50 MLR 603) in such cases.

Recovery of deposits

20.8 Two Singapore cases dealt with the question of recovery of deposits after a contract has been discharged for breach. As the relevant law is complex, some background exposition is necessary before turning to the discussion of the decisions. A deposit may be recoverable by the innocent party to the breach of contract under an express or implied contractual right, or under the law of restitution. This chapter is concerned with the recovery of a deposit by the party in breach of contract. The defaulting party ordinarily does not have a contractual right to recover the deposit, and any claim would have to be made under the law of restitution.

Penalty in liquidated damages

20.9 The law on penalties disguised as liquidated damages clauses is fairly clear today, despite a complex history of the mingling of common law and equity. Equity took the first steps to relieve against penalties. Statute law then compelled the common law courts to relieve against common money bonds and penal bonds to enforce covenant ((1705) 4 & 5 Anne c 16, ss 12–13 and (1696) 8 & 9 William III c 11, s 8). Taking the lead from equity and statute, the common law fashioned its own rules after equity. The pre-Judicature common law is exemplified in *Kemble v Farren* (1829) 6 Bing 141 at 148; 130 ER 1234 at 1237 where Tindal CJ said:

> If therefore on the one hand the Plaintiff had neglected to make a single payment of £3 6s. 8d. a day, or on the other hand the defendant had refused to conform to any usual regulation of the theatre, however minute or unimportant, it must have been contended that the clause in question in either case would have given the stipulated damages of £1000. But that a very large sum should become immediately payable in consequence of the non-payment of a very small sum, and that the

> former should not be considered as a penalty, appears to be a contradiction in terms, the case being precisely that in which Courts of Equity have always relieved, and against which Courts of Law have, in modern times, endeavoured to relieve, by directing juries to assess the real damages sustained by the breach of the agreement.

20.10 The penalty rule has been variously described as a common law rule (Bingham LJ in *Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd* [1989] QB 443 at 439) or an equitable rule (Lord Diplock in *Photo Production Ltd v Securicor Transport Ltd* [1980] AC 827 at 850), or more correctly, as a mixture of both. Dillon LJ in *Jobson v Johnson* [1989] 1 WLR 1026 at 1033 said:

> Now that the jurisdictional differences between the courts of common law and equity no longer exist, any court, English or Scottish, when faced with a claim for a sum of money payable on default which it identifies as a penalty, must refuse to enforce the penal part of the sum and must give judgment for the claimant merely for the actual damages suffered by the claimant, with, as appropriate, interest and costs.

20.11 Thus, in the modern law, there is no practical need to distinguish between common law and equity as far as the penalty rule is concerned, when it comes to the enforcement of liquidated damages. In both cases, the consequence of finding the clause to be a penalty is that the court will not allow the clause to be enforced beyond the legally recoverable damages (*Jobson v Johnson* [1989] 1 WLR 1026 at 1033–1034, 1040–1041).

Penalty in deposits

The position at common law

20.12 The law relating to the recovery of deposits, however, developed along a different route, and the law, especially the relationship between common law and equity, is still unsettled. Deposits are usually paid upfront to be forfeited upon breach, while liquidated damages are not payable until breach. But this distinction is chronological, and it virtually disappears when the innocent party is suing for an unpaid deposit (see, *eg*, *The Blankenstein* [1985] 1 WLR 435 (CA)). The starting point is that, in principle, it appears that the same penalty rule should apply whether the sum involved is found in a liquidated damages clause or a penalty clause. Thus, in *Workers Trust & Merchant Bank Ltd v Dojap Investments Ltd* [1993] AC 573 (PC, Jamaica) at 578, Lord Browne-Wilkinson said:

> In general, a contractual provision which requires one party in the event of his breach of the contract *to pay or forfeit a sum of money* to the other party is unlawful as being a penalty, unless such provision

> can be justified as being a payment of liquidated damages being a genuine pre-estimate of the loss which the innocent party will incur by reason of the breach. [emphasis added]

20.13 However, unlike the law on liquidated damages clause, the law on recovery of deposits developed along a different historical route and has legitimised the concept of "earnest money", or a guarantee for performance (*Howe v Smith* (1884) 27 Ch D 89 at 101–102). In other words, the law allows a non-compensatory function. Thus, the deposit may be retained upon breach even if it bears no relationship to the loss suffered by the innocent party. Neither the common law nor equity will relieve against it as a penalty: *Howe v Smith* (1884) 27 Ch D 89 at 95; *Mayson v Clouet* [1924] 1 AC 980 (PC, Singapore); *Union Eagle Ltd v Golden Achievement Ltd* [1997] AC 514 (PC, Hong Kong) at 518; *Workers Trust & Merchant Bank Ltd v Dojap Investments Ltd* [1993] AC 573 at 578–579; *Bidaisee v Sampeth* (3 April 1995) (PC, Trinidad and Tobago); *Linggi Plantations Ltd v Jagatheesan* [1972] 1 MLJ 89 (PC, Malaysia) at 94.

20.14 Nevertheless, the modern common law recognised the possibility of abuse, and, therefore, confined its indulgence to deposits which are *reasonable* in the circumstances (*Workers Trust Bank Ltd v Dojap Ltd* [1993] AC 573; *Linggi Plantations Ltd v Jagatheesan* [1972] 1 MLJ 89 (PC, Malaysia) ("*Linggi Plantations*") at 94). An unreasonable deposit will be treated as a colourable part payment (*Linggi Plantations* at 94). The common law will disregard the element of "earnest" in the deposit, and it may be recoverable under the law of restitution as a part payment (*Polyset Ltd v Panhadat Ltd* [2002] 3 HKLRD 319 (CFA, HK) noted in L Ho, "Deposit: The Importance of Being (an) Earnest" (2003) 119 LQR 34). Of course, a ground for restitutionary recovery still needs to be demonstrated (see, *eg*, a claim for restitution failed because total failure of consideration could not be shown in *Lim Lay Bee v Allgreen Properties Ltd* [1999] 1 SLR 471 (CA) at [21]).

20.15 The common law applicable to deposits remains distinct from that applicable to liquidated damages; the element of earnest for performance remains. It is evident that Lord Browne-Wilkinson was not applying the penalty rule in liquidated damages to deposits in *Workers Trust Bank Ltd v Dojap Ltd* [1993] AC 573. He said that it was difficult to define the test of reasonableness (at 580); in contrast, the genuine pre-estimate of loss test is well-established. Thus, once a deposit is found to be reasonable, no inquiry is made as to whether it is a genuine pre-estimate of damage or not: *Triangle Auto Pte Ltd v Zheng Zi Construction Pte Ltd* [2001] 1 SLR 370 at [9]–[16]; *Union Eagle Ltd v Golden Achievement Ltd* [1997] AC 514 (PC, Hong Kong) at 518; *Polyset Ltd v Panhadat Ltd* [2002] 3 HKLRD 319 (CFA, HK).

20.16 However, the common law position in Singapore has been thrown into some doubt by the Court of Appeal decision in *Lee Chee Wei v Tan Hor Peow Victor* [2007] 3 SLR 537. The case dealt with a wide variety of contractual issues, but for the present purpose, the facts can be simply stated. The plaintiff contracted to sell some shares in a public company to the defendant, and had received an instalment of the purchase price. The plaintiff sued for specific performance of the agreement, while the defendant counterclaimed for the return of the instalment payment. In the circumstances, specific performance was refused. In considering the counterclaim, the court said (at [84]):

> The *invariable* judicial approach to forfeitable deposits at common law is that the deposit will be forfeited to the payee upon the discharge of the contract on the default of the payer, irrespective of whether it would have been deemed part-payment had the contract been completed. [emphasis added]

20.17 This was only an observation of the court since the court found that the instalment was part payment only and not intended as a matter of contractual construction to be security for performance.

20.18 The statement, particularly the emphasis on the invariability of the common law approach, could be read to suggest that the test of reasonableness for deposits has no place in the common law of Singapore. However, no relevant authorities or arguments appeared to have been cited or considered on this specific point, and it is suggested that it would be taking too wide a reading of the statement to impute to the court that it would take such a restrictive attitude to the common law. It may be that the observation is to be confined to *reasonable* deposits. On the other hand, it may be that the court was expressing a preference to deal with the issue in its equitable jurisdiction instead.

The position in equity

20.19 The role of equity in the recovery of deposits is even less settled. The starting point is that different principles applied between relief against penalties and relief against forfeiture of proprietary interests (*Union Eagle Ltd v Golden Achievement Ltd* [1997] AC 514 (PC, Hong Kong) at 520; *Jobson v Johnson* [1989] 1 WLR 1026 (CA)). *Pacific Rim Investments Pt Ltd v Lam Seng Tiong* [1995] 3 SLR 1 (CA) at 16–17 recognised that they were different forms of relief. The former has solidified into the rule mentioned in the earlier section on liquidated damages. As far as relief against penalties is concerned, equity will follow the law as far as unreasonable deposits are concerned: in such a case, the court *will* give relief by ordering the return of the deposit less any damage actually proven to have been suffered (*Workers Trust Bank Ltd v Dojap Ltd* [1993] AC 573 at 582). Conversely, in the case of reasonable deposits, it will not grant relief (see para 20.13 above). These principles

are not confined to contracts for the purchase of immovable property (*The Blankenstein* [1985] 1 WLR 435 (CA); *Triangle Auto Pte Ltd v Zheng Zi Construction Pte Ltd* [2001] 1 SLR 370 at [13]).

20.20 Relief against forfeiture, however, remains fluid. Traditionally, equity treated the right to forfeit as security for performance only and would, in exceptional situations of unconscionability and injustice (*Pacific Rim Investments Pte Ltd v Lam Seng Tiong* [1995] 3 SLR 1 (CA) at 23), grant relief in the form of additional time for the party in breach to perform its side of the bargain. The jurisdiction has generally been confined to the relief against forfeiture of proprietary and possessory interests (*Pacific Rim Investments Pte Ltd v Lam Seng Tiong* [1995] 3 SLR 1 (CA) at 16; *The Scaptrade* [1983] AC 694) and it is doubtful that it applies to commercial contracts unconnected with any interests in land (*Pacific Rim Investments Pte Ltd v Lam Seng Tiong* [1995] 3 SLR 1 (CA) at 16; *Sport International Bussum BV v Inter-Footwear Ltd* [1984] 1 WLR 776 (HL) at 788).

20.21 The fundamental distinction between the two types of equitable jurisdiction was succinctly summarised in C Harpum, "Equitable Relief: Penalties and Forfeitures" [1989] CLJ 370 at 370–373. In its jurisdiction to relieve against penalties, the court is only concerned to prevent oppressive conduct of the innocent party in claiming beyond actual losses. The conduct of the party in breach is irrelevant; relief is not discretionary. On the other hand, the jurisdiction to relieve against forfeiture is exercised by balancing the result sought to be achieved by the forfeiture clause against the nature and gravity of the breach, and the value of the property forfeited against the loss suffered. The court's objective is not only to compensate the innocent party but also to absolve the party in breach, whose conduct therefore becomes relevant. In some cases, the same provision may be both a penalty and a forfeiture clause, in which case, both jurisdictions are potentially available and the plaintiff is allowed to choose which to rely upon (*Jobson v Johnson* [1989] 1 WLR 1026). But ordinarily, there is no retention of property in the payment of money, and the "forfeiture" of deposits or part payments is not used in the legal sense of forcing a transfer of property.

20.22 In *Stockloser v Johnson* [1954] 1 QB 476, the majority (Denning and Somervell LJJ) made the observation that the jurisdiction to relieve against forfeiture could be extended to the forfeiture of part payments, if it had been considered penal, in two ways: (a) by extending the scope of the jurisdiction beyond the forfeiture of proprietary interests; and (b) by extending the remedy, beyond the granting of additional time for performance, to ordering the return of money paid. In *Workers Trust & Merchant Bank Ltd v Dojap Investments Ltd* [1993] AC 573 at 582, Lord Browne-Wilkinson had declined an invitation to pronounce on the correctness of this proposition. However, in *Union Eagle Ltd v Golden*

Achievement Ltd [1997] AC 514 (PC, Hong Kong) at 520, Lord Hoffmann said in respect of deposits paid in sale of land contracts:

> *So far as these retentions exceed a genuine pre-estimate of damage or a reasonable deposit they will constitute a penalty* which can be said to be essentially to provide security for payment of the full price. No objectionable uncertainty is created by the existence of a *restitutionary form of relief against forfeiture*, which gives the court a *discretion* to order repayment of all or part of the retained money. [emphasis added]

20.23 This *dictum* clearly supports the application of the equitable jurisdiction to relieve against forfeiture to penal deposits, at least in contracts relating to interests in land in a situation where an order for specific performance has been declined by the court (*ie*, the equitable interest of the purchaser in the property arising from the contract of sale has been forfeited – no relief being given by the court – by the vendor in accordance with the contract). A similar argument for extension had been presented to the Court of Appeal in *Lim Lay Bee v Allgreen Properties Ltd* [1999] 1 SLR 471. However, the court did not deal with the issue of law because it found that the argument had no factual foundation, and also because it held that the retention of the sum was sanctioned by statute (at [33]–[34]). In so far as *Union Eagle Ltd v Golden Achievement Ltd* [1997] AC 514 rejected the jurisdiction to relieve against forfeiture of the equitable interest in an ordinary sale of land contract where time was of the essence and performance was tendered ten minutes late, the case may not be totally consistent with the approach of the Singapore court in *Pacific Rim Investments Pt Ltd v Lam Seng Tiong* [1995] 3 SLR 1 (CA). However, what it says about relief against the forfeiture of the deposit is still relevant to Singapore law.

20.24 The approach proposed in *Union Eagle Ltd v Golden Achievement Ltd* [1997] AC 514 is different from relief against penalties because it is *discretionary*, and the court may order relief on terms. Lord Hoffmann also referred to the *restitutionary* function of this relief. This overlaps with the common law restitutionary recovery in the case of unreasonable deposits, but it is perhaps not restricted by the need to show strictly that the elements of unjust enrichment at common law (*eg*, total failure of consideration) have been satisfied. Conversely, it may allow only partial recovery where the common law would have allowed recovery of the full deposit. The context of Lord Hoffmann's proposition must also be appreciated: he was offering this solution as a less disruptive judicial intervention than relief against the contractual forfeiture of an equitable interest in land. However, the principle proposed, based on the discretionary judicial reversal of unjust enrichment, could potentially traverse beyond that situation.

20.25 Furthermore, given his acceptance of counsel's concession (at 518) about not applying the genuine estimate of loss test to the reasonable deposit, it would appear that he was suggesting that, for the purpose of relief against forfeiture, a deposit may be regarded as penal if it is not reasonable *or* if it is excessive of a genuine pre-estimate of loss. This proposes a wider scope for the intervention of equity than in the case of relief against penalties. The extent of the difference in practice may, however, be narrowed if the issue of genuine pre-estimate of loss is *in fact* taken into consideration in determining whether a deposit is reasonable. This is possible because the reasonableness test remains open-ended. Similarly, the greater readiness of modern courts (see, *eg*, *Murray v Leisureplay plc* [2005] EWCA Civ 963; [2005] IRLR 946, especially at [55] and [114]–[118]) to look to the commercial reasons of the parties for including liquidated damages clauses in their contracts to validate such clauses may also practically narrow the gap.

20.26 Given this backdrop, it was not surprising that the High Court in *Metro Alliance Holdings & Equities Corp v WestLB AG* [2008] 1 SLR 139 found itself treading on somewhat treacherous ground. The plaintiff was interested in purchasing a sub-participation interest in a debt but was prohibited from taking a direct assignment from a bank by the master participation agreement. Following the bank's advice, the plaintiff contracted with the defendant, under which the defendant was to purchase the interest from the bank and then assign the interest to the plaintiff. The plaintiff paid the defendant some US$1.6m, comprising some US$1.46m as non-refundable deposit and the rest being interest and fees. A balance of some US$8.76m remained to be paid. The relevant clause, a "termination clause", stated that the plaintiff's rights to the deposit and the subject of the assignment would be forfeited upon his failure to pay the deposit or balance of purchase price in accordance with their contract. The transaction broke down and the parties disputed the other terms of their agreement. The plaintiff sought the return of the US$1.6m. The assistant registrar decided that the plaintiff was in breach of contract in failing to pay the balance of the purchase price, that the "termination clause" was not penal, and that the plaintiff would not be granted relief from forfeiture.

20.27 In the appeal to the High Court, counsel for plaintiff apparently conceded that the termination clause was not a penalty (at [18]). The court then spent considerable time deciding whether the plaintiff was entitled to relief against forfeiture. The court considered both the authorities on relief against forfeiture (noting that it may not extend beyond contracts involving the forfeiture of proprietary or possessory interests in immovable property) (at [20]), and the authorities on recovery of deposits (at [21]). However, the court apparently did not treat the two sets of authorities as raising two different points of law, and treated the facts as raising only the question of relief against

forfeiture. Without deciding that such relief extended to a commercial contract not relating to property interests in land (at [23]), the court found that the deposit was not unreasonable in the circumstances and held that there was in any event no ground to grant relief against forfeiture.

20.28 The first point of interest arising from the case is why the court even considered the possibility of relief when it was conceded that the clause was not a penalty. Nothing in the existing authorities justifies relief from a non-penal deposit. The source of this oddity appears to be the way the case had been posed to and answered by the district court. To the question "Whether the Termination Clause in the WestLB-Metro Trade Confirmation is a penalty and therefore unenforceable?", the assistant registrar had answered (see *Metro Alliance Holdings & Equities Corp v WestLB AG* [2008] 1 SLR 139 at [9]–[10]):

> No, not in the sense of *Dunlop Pneumatic Tyre Co Ltd v New Garage and Motor Co Ltd* [1915] AC 15 as the defendants were not seeking to enforce the Termination Clause but rather that the plaintiffs were seeking relief from forfeiture.

20.29 This answer has to be read in the context of the further question whether the plaintiff were entitled to equitable relief from forfeiture in principle or on the facts, to which the answer was also: "No".

20.30 The assistant registrar was obviously mindful of the distinction between liquidated damages and deposits, and clearly meant that for the purpose of the claim for relief against forfeiture, the clause was not penal. That also explained why the answer to the next question was monosyllabic; nothing further needed to be said once the clause was not penal.

20.31 The concession of counsel must therefore be understood to be confined to a fairly obvious point: the termination clause was not a penalty as far as any liquidated damages were being claimed (which were not). That simply cleared the way for considering the issue of the recovery of the deposit.

20.32 The second point of interest in the case was that the High Court found that there was no ground to grant relief against forfeiture because the deposit was a reasonable one. It would appear that the test of unreasonableness in relief against penalties has been assimilated to the test of unconscionability in relief against forfeiture at least in so far as the latter applies to the recovery of deposits.

20.33 This case, if taken as authoritative, would *unify* the law on penalties in the recovery of deposits, whether one pleads the case in common law restitution, equitable relief against penalties, or equitable

relief against forfeiture. Its status as an authority, however, remains unclear, as there were no explicit considerations of any arguments for or against such an approach, and the somewhat unconscious nature of the assimilation. It could also be explained on the basis that there was no evidence of unconscionability on the facts.

Deposits: reasonableness or genuine pre-estimate of loss?

20.34 In summary, it is clear that under Singapore law, a reasonable deposit will, at least generally, be enforceable. Equity will relieve against an unreasonable deposit as a penalty by ordering repayment. It is less clear whether a common law restitutionary action will succeed. Additionally, it is not clear whether the equitable jurisdiction to relieve against forfeiture applies to the recovery of deposits, but it may be that it makes no practical difference if the same test of reasonableness is used to determine whether the jurisdiction is to be exercised (see also para 20.33 above).

20.35 Where should the law of Singapore go from here? The first question in principle is whether the distinction should continue to be drawn between deposits and liquidated damages. Many have argued that, to the extent that they both allow monetary compensation beyond actual losses, they should be subject to the same rules. Although the distinction between a liquidated damages clause that acts *in terrorem* and a deposit that acts as an earnest for performance has been said to be merely a semantic one (see, *eg*, *Treitel: The Law of Contract* (E Peele ed) (Thomson, 12th Ed, 2007) at para 20-137), there is something to be said for the *cautionary* role that is played by deposits but not necessarily the liquidated damages clauses. The prepayment of (or obligation to pre-pay) a deposit gives the contracting party specific notice from the outset about the seriousness of the expected contractual performance and the consequences of breach. The limits of party autonomy are thereby drawn according to the functions of the clauses. As Lord Millett NPJ said in *Polyset Ltd v Panhadat Ltd* [2002] 3 HKLRD 319 (CFA, HK) at 165:

> The principle of party autonomy is, of course, a cornerstone of the law of contract. But the principle is not without limits, and it does not permit parties to contract in whatever terms they choose in all circumstances. It cannot be invoked to prevent a party from challenging a contractual term to which he has agreed which stipulates for the payment of a penalty (in the strict sense) in the event of breach. Nor does it prevent a party from challenging a contractual term to which he has agreed which stipulates for the payment in advance of a forfeitable deposit so large that it cannot be objectively justified by reference to the functions which such a deposit properly serves.

20.36 If the distinction is thus maintained, what about the relationship between common law and equity? There is much to be said for the position that common law and equity should approach deposits in the same way. Thus, in the case of a *reasonable* deposit, restitutionary recovery at common law will be precluded, and equity's jurisdiction to relieve against penalties will not be exercised. However, no substantial harm is done by doing all the work in equity (see paras 20.16–20.18 above), *ie*, all deposits are enforceable at common law, but unreasonable deposits will be subject to relief against penalties in equity. But some things are lost: jurisprudentially, relief against penalties is one rare area where there has been harmonious development of common law and equity; practically, the simple procedure for a common law claim for a debt is thereby lost.

20.37 Where the deposit is unreasonable, it is an unnecessary complication to consider the equitable jurisdiction to relieve against forfeiture. It may be argued that the equitable jurisdiction can still be relevant if the common law should insist on strict *total* failure of consideration as a ground of restitution; but the failure of a clearly severable part of the consideration may ground a restitutionary claim at common law: see (2002) 3 SAL Ann Rev 325 at para 19.87. It may also be argued that the equitable jurisdiction is a more flexible one because the court may order recovery of less than the full sum of the deposit to take account of the losses suffered by the innocent party. On the other hand, the innocent party is always free to mount its own action for damages for breach of contract.

20.38 Putting to one side the *Union Eagle* type of situation (*Union Eagle Ltd v Golden Achievement Ltd* [1997] AC 514) where the forfeiture involves both an equitable proprietary interest as well as a contractual deposit, where the deposit is not unreasonable, should the equitable jurisdiction to relieve against forfeiture be extended to the recovery of deposits? One possibility seen above (paras 20.22–20.25) is where the deposit is reasonable as earnest but nevertheless not a genuine pre-estimate of loss. But the law will be caught in an internal contradiction if it says on one hand that a reasonable deposit is a legitimate guarantee of performance but on the other hand that relief will be granted to ensure that the innocent party gets no more than his actual loss.

20.39 One possible rationalisation is to say (as implied in *Metro Alliance Holdings & Equities Corp v WestLB AG* [2008] 1 SLR 139) that if the deposit is not unreasonable, then it is *ex hypothesi* not unconscionable to forfeit it in accordance with the contract. This approach has the advantage of simplicity and certainty: the issue is resolved in one step, and the contracting parties are clearer as to their respective legal positions. This measure of certainty is important in commercial transactions. Further, it should not matter whether the

relief sought is the return of the deposit or the extension of time for performance to prevent forfeiture of the deposit. Either way, the court is being asked to relieve the party in breach of the contractually planned consequences thereof. Deposits in consumer transactions, on the other hand, may be the subject of relief under the Consumer Protection (Fair Trading) Act (Cap 52A, 2004 Rev Ed).

20.40 Another approach is to say that there could be circumstances of unconscionability apart from the reasonableness of the deposit that could constitute grounds for relief against forfeiture. In such a case, the penal element in the deposit would arise from the unconscionable conduct of the party enforcing it (*cf* Romer LJ in *Stockloser v Johnson* [1954] 1 QB 476 at 501). Traditionally this jurisdiction is only exercised in exceptional situations of unconscionability where clear injustice can be demonstrated. But, in the context of contractual deposits, it is hard to pinpoint any unconscionability that will not also invoke some existing doctrine that would already enable the other contracting party to get out of the contract or to prevent or restrain enforcement of the deposit clause as a contract term: *eg*, estoppel, undue influence, unconscionable bargain, *etc*. On the whole, the reluctance of the court to extend this jurisdiction to commercial contracts not relating to interests in land is grounded on a sound inertia.

20.41 There could, however, be a residual role for equitable relief against forfeiture in cases of forfeiture of instalments which do not purport to be deposits at all (and therefore not subject to any test of reasonableness), and for which the common law fails to provide a satisfactory restitutionary remedy (*eg*, if *total* failure of consideration is strictly insisted upon as a restitutionary ground). For example, if a hire-purchase contract is terminated for non-payment near the end of its life after substantial instalments have been paid, where the hirer in breach is not ready and willing to perform (if he is, he could invoke the relatively more established relief against forfeiture jurisdiction to obtain more time). In consumer transactions, the Consumer Protection (Fair Trading) Act (Cap 52A, 2004 Rev Ed) may provide some relief if the actions of the hirer can be characterised as unfair under the statute (for example, the unfair practice of "[t]aking advantage of a consumer by including in an agreement terms or conditions that are harsh, oppressive or excessively one-sided so as to be unconscionable" in s 4(*d*), Sch 2, para 11). Small traders will not be so protected. To this extent, the issue of the scope of the equitable relief against forfeiture jurisdiction in *Stockloser v Johnson* [1954] 1 QB 476 remains an open one.

Knowing receipt

Strangers and fiduciaries

20.42 The other appeal in *Creanovate Pte Ltd v Firstlink Energy Pte Ltd* [2007] 4 SLR 780 (discussed at para 20.2 above), which was substantially concerned with issues of company law, was also dismissed. While the High Court had allowed the claims against the directors of a company for various breaches of fiduciary duties and of the Companies Act (Cap 50, 1994 Rev Ed) for the misuse of funds received by the company, one of the issues raised in the case was the liability of the directors of a company for the misuse of funds received by the company before the directors were appointed. The liability in this respect was pleaded as one for knowing receipt, and the trial judge's dismissal of that claim on the basis that it had been inadequately pleaded was discussed in (2006) 7 SAL Ann Rev 397 at paras 20.4–20.10.

20.43 The Court of Appeal agreed with the decision of the trial judge (at [42]) though it disagreed on the interpretation of several important provisions in the Companies Act (Cap 50, 1994 Rev Ed). The Court of Appeal, however, noted that there was overwhelming evidence adduced at the trial suggesting that the directors had in fact diverted for their own benefit the entire sum advanced to the company (at [39]). On this view of the facts, it would be irrelevant to consider whether the directors could be liable in knowing receipt for the sums received by the company before their appointment; they would be *primarily* liable for breaches of duties while they were fiduciaries.

Strangers to the trust no longer?

20.44 *Comboni Vincenzo v Shankar's Emporium (Pte) Ltd* [2007] 2 SLR 1020 arose out of a typical e-mail scam. In 2004, the plaintiff had responded to an unsolicited e-mail purportedly from a Nigerian person who had recently come into a huge inheritance of some US$20m, and who requested for investment advice and assistance. The plaintiff, a retired banker and financial trustee in Switzerland, offered his professional services. The defendant was a company incorporated in Singapore and ran an international trading business from Singapore. The defendant traded with a number of Nigerian customers, selling goods to them. Because of strict currency controls in Nigeria, payments in foreign currency were invariably made through intermediaries. The plaintiff was persuaded by various parties allegedly linked to the author of the e-mail that various payments had to be made in order to secure the release of the funds from Nigeria. He was instructed to remit three sums of money, amounting to more than US$1m, to the defendant. Acting on instructions, the plaintiff included in all three remittances the

narration "by order" of L. L was one of many Nigerian customers of the defendant. Having received the funds, the defendant was instructed by L to apply the sums towards reducing the amounts owed by a number of Nigerian customers, including L. At the time of trial, a sum of some US$103,000 stood to the credit of L's account.

20.45 The trial judge, Kan Ting Chiu J, observed that the statement of claim left much to be desired in terms of stating the legal causes of action. They included claims that the defendant was liable in conspiracy (along with L and several other parties), that the defendant had knowingly participated in the fraud and had become a constructive trustee of all the money received, that the defendant was liable for receiving money mistakenly paid out by the plaintiff, and that the defendant had acted negligently causing loss to the plaintiff. The judge noted that by the time the trial opened, the issues were narrowed down to: (a) whether the words "for the account of" the plaintiff, in the first two remittances, created an express trust in favour of the plaintiff; (b) whether the defendant was liable to account to the plaintiff for the money received on the basis of knowing receipt; and (c) whether the defendant was liable in conspiracy. However, in the course of trial, the conspiracy claim was abandoned.

20.46 The express trust claim was quickly dismissed. The evidence revealed that the plaintiff had no intention that the money should be held on trust for him. He had intended that the money should be used to release the funds from Nigeria. This aspect of the decision is unexceptional. The plaintiff did not appear to have argued a *Quistclose* trust (*Barclays Bank Ltd v Quistclose Investments Ltd* [1970] AC 567) on the basis that the money was to be used only for a specific purpose (see T M Yeo and H Tjio, "The *Quistclose* Trust" (2003) 119 LQR 8 at 12–13). However, this argument was not likely to have succeeded in any event as it appeared that the purpose of the payment was not communicated to or accepted by the defendant.

20.47 The claim in knowing receipt, however, took a curious turn. Proceeding on the elements of the claim as set out in *Caltong (Australia) Pty Ltd v Tong Tien See Construction Pte Ltd* [2002] 3 SLR 241 at [31], the court accepted that the plaintiff must show: (a) a disposal of his assets in breach of trust or fiduciary duty; (b) the beneficial receipt by the defendant of assets traceable as representing the assets of the plaintiff; and (c) knowledge on the part of the defendant that the assets he received are traceable to a breach of trust or fiduciary duty (at [49]).

20.48 The defendant argued that the money it received had never been subjected to any trust, so that there could be no knowledge of breach of trust (at [50]). However, the court accepted the defendant's concession that it may nevertheless be liable in knowing receipt if a

remedial constructive trust is found against it (at [50] and [53]), and the rest of the judgment proceeded on that basis. The court held that the defendant's conscience must be affected by actual knowledge or wilful avoidance of knowledge of the fraud. The court found that although the defendant had been alerted by the authorities in 2003 that some of its remittances may be tainted and had in the present case failed to follow the internal safeguards that it had instituted as a result, the most that could be said against the defendant was that it was mindful of the *possibility* of fraud, but the defendant's conscience could not be said to have been affected in the circumstances. However, by the conclusion of the trial, the defendant would have known about the fraud and so held the remaining sum in its hand on constructive trust for the plaintiff. On the issue of whether the defendant had a clear conscience, the court drew no distinction between the issue of liability for knowing receipt and the finding of a remedial constructive trust.

20.49 With respect, to say that the knowledge of breach of trust of fiduciary duty can be substituted with a finding of a remedial constructive trust to found liability in knowing receipt defies understanding. In the first place, it conflates a *personal* claim that the defendant should account for money received as if the defendant were a trustee with a *proprietary* claim to the property in the hands of the defendant. In the second place, it turns the learning on knowing receipt inside out. The purpose of the law on knowing receipt is to protect the trust and fiduciary institutions from interference by *third parties* (or *strangers*) to the trust or fiduciary duty. This is why their knowledge of the breach of trust or fiduciary duty is crucial for their conscience to be affected. If the third party is said to hold the property on a remedial constructive trust, then at once he is no longer a stranger to any trust; he *is* the trustee. From that moment on, his liability, whether to return the property *in specie* or to account personally for failing to do so, is *qua* trustee. Knowing receipt is superfluous in actions against trustees.

20.50 As a matter of law, the proposition that there must be knowledge of an antecedent breach of trust before liability as a knowing recipient can attach must be correct, subject to the qualification that knowledge of a breach of fiduciary duty in the disposition of the property may be sufficient, but on the facts this was not present either. This should have raised the red flag that knowing receipt was not relevant on the facts. Equity is ever ready to come to the aid of those defrauded, but knowing receipt is only one of the tools in the arsenal. Where B has deceived A into paying money to C, property in the money at law and in equity passes to C. Equity, however, allows A to rescind the transaction as against C if C is not a *bona fide* purchaser for value without notice.

20.51 As Wilmot LCJ said of a third party volunteer who received a benefit from one under the undue influence of another: "Let the hand receiving it be ever so chaste, yet, if it comes through a polluted channel, the obligation of restitution will follow it." (*Bridgeman v Green* (1757) 2 Wilm 58 at 64, 97 ER 22 at 24–25). This is reinforced by the statement in *Homeward Bound Gold Mining Co v McPherson* (1896) 17 NSW Eq 281 at 319, that "equity will not permit any person … to hold a benefit which he derives from the fraud of another as against the person who, but for the fraud, would be entitled", approved of in *Lonrho plc v Fayed (No 2)* [1991] 4 All ER 961 at 970. In *Huguenin v Baseley* (1807) 14 Ves Jun 273 at 289; 33 ER 526 at 532, Lord Eldon was most explicit that the third party recipient would hold the property on trust:

> The case of *Bridgeman v Green* (2 Ves Jun [sen] 627; Wilm 58) is an express authority, that it is within the reach of the principle of this Court to declare, that interests, so gained, by third persons, cannot possibly be held by them; and Lord Hardwicke observes justly, that if a person could get out of the reach of the doctrine and principle of this Court by giving interests to third persons, instead of reserving to them to himself, it would be almost impossible ever to reach a case of fraud.

20.52 These statements must, of course, be understood against the general backdrop of trust principles, especially those aired by Lord Browne-Wilkinson in *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] AC 669 ("*Westdeutsche*") at 705–706, where he explained that the essence of a trust was an affected conscience coupled with identifiable property. Thus, the innocent recipient will not be regarded as a *trustee* until such time as he acquires knowledge, even though the defrauded party upon rescission may have sufficient equitable interest at the outset in all the property received by the volunteer for the purpose of the law of tracing (*Lonrho plc v Fayed (No 2)* [1991] 4 All ER 961 at 971–972; *El Ajou v Dollar Land Holdings plc* [1993] 3 All ER 717 at 734 (reversed on a different point in [1994] 2 All ER 685 (CA)). This is not a remedial trust but a good old-fashioned institutional trust. Indeed, the principles in the *Westdeutsche* case were applied by the judge in coming to the conclusion that the remaining sums were held on trust for the plaintiff (at [78] and [82]–[84]).

20.53 On the present facts, in the case of all three remittances, the defendant had received the money as a volunteer, and had subsequently been instructed by L to utilise the funds received to discharge debts of various Nigerian customers (including L) and to extend further credit to them. On the basis of the finding that the conscience of the defendant was not tainted by the fraud, the result in the case can be justified on traditional trust principles without recourse to liability in knowing receipt or the open-ended discretionary remedial constructive trust.

20.54 While on the findings of fact the result was undoubtedly right, in so far as this case signals a tendency to abjure traditional trust principles and to rely instead on the remedial constructive trust where the arguments may be more open-ended, it threatens to push Singapore law down a dangerous and slippery slope.

20.55 Moreover, it is not clear why the common law claim for restitutionary recovery of mistaken payment, which was the most straightforward claim (since the solvency of the defendant did not appear to be in question), was not pressed very hard. Liability would have been strict subject to the *bona fide* change of position defence. Although the court did leave open the question whether there had actually been change of position (see below), it would appear that under Singapore law at least the defence is disqualified by lack of probity (*Seagate Technology Pte Ltd v Goh Han Kim* [1995] 1 SLR 17 at 30) though the more amorphous test of unconscionability is used in English law (*Niru Battery Manufacturing Co v Milestone Trading Ltd* [2004] 1 All ER Comm 193, [2003] EWCA Civ 1446); thus, the same results would probably have been obtained on the facts.

20.56 It is also unclear why its equitable analogue, the claim that the defendant held the property on constructive trust the moment it became aware of the plaintiff's mistake (*Chase Manhattan NA v Israel-British Bank (London) Ltd* [1981] Ch 105 ("*Chase Manhattan*") as explained in *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] AC 669 at 715, and applied in *Re Pinkroccade Educational Services Pte Ltd* [2002] 4 SLR 867) did not appear to have been pressed, unless it had been argued as part of the case of the remedial restitutionary constructive trust. It has been argued elsewhere that the two types of trust are different (T M Yeo and K Tan, "Civil Remedies" in *Developments in Singapore Law between 2001 and 2005* (Teo Keang Sood ed) (Singapore Academy of Law, 2006) ch 4, at paras 13–17 and 22). In any event, the same results are likely to have been obtained on the facts of the case, as the *Chase Manhattan*-type constructive trust will only arise upon the knowledge by the defendant of the plaintiff's mistake, and therefore attach only to the remaining sum of money standing to the credit of L. This type of trust is not without its own difficulties if it is applied as a general restitutionary proprietary remedy (see "Civil Remedies", at para 15), but given its existence in the law reports of Singapore, it would, nevertheless, have been a simpler way to resolve the case, without engaging in the difficulties of the open-ended and discretionary remedial constructive trust.

Mistaken payment: Assumption of risk

20.57 In *Comboni Vincenzo v Shankar's Emporium (Pte) Ltd* [2007] 2 SLR 1020 (facts summarised in, above, para 20.43), one of the plaintiff's claims was that the money was paid under a mistake of fact. In rejecting the argument of the defendant that the plaintiff was not entitled to restitution because he had voluntarily assumed the risk of the mistake in making the remittances, the court found that on the facts the plaintiff had not made any voluntary assumption of risk in making the payments. The court found that the plaintiff had been completely taken in by the conmen, and did not think that there were any risks in making the payments (at [68]).

20.58 The test applied appeared to be a *subjective* one: whether the plaintiff consciously assumed the risk of mistake. This may be seen to follow from the fact that the test for whether the plaintiff made a mistake is also a subjective one. The question is not whether a reasonable person would have been mistaken but whether this particular plaintiff had actually been mistaken. Similarly, a "deliberate waiver of inquiry" is required to amount to an assumption of risk: *Scottish Equitable plc v Derby* [2001] 3 All ER 818 at [24]. If the mistaken party had acted recklessly, however, it may be open to the court to draw the inference that he had intended to pay in any event and so must be taken to have assumed the risk of the mistake.

Restitution for wrongs: Bribery

20.59 In the previous issue ((2006) 7 SAL Ann Rev 397 at paras 20.11–20.16), the High Court case of *Carrefour Singapore Pte Ltd v Leong Wai Kay* [2006] 4 SLR 412 was noted as having decided that the employer of a bribed employee could recover the amount of the bribe from the employee under s 14(1) of the Prevention of Corruption Act (Cap 241, 1993 Rev Ed) even though the employee had been ordered to pay a penalty equal to the amount of the bribe in earlier criminal proceedings under s 13 of the same Act. It was briefly mentioned in that issue that the decision had been upheld on appeal. The decision of the Court of Appeal in *Leong Wai Kay v Carrefour Singapore Pte Ltd* [2007] 3 SLR 78 sends a strong signal about the anti-corruption stance of Singapore law.

20.60 In dismissing the appeal, the Court of Appeal briefly traced the history of the principal's action against the agent to recover the bribe first in equity and then in common law, and then discussed the relationship between the two statutory provisions. The court held that the Parliamentary intention behind the provisions was to ensure both criminal and civil deterrence of corruption.

Relationship between statute and common law

20.61 In (2006) 7 SAL Ann Rev 397 at para 20.16, it was pointed out that it was not clear whether the civil action under s 14(1) of the statute was the same as the common law action. If it is different, the common law action had not been relied upon by the employer in the present case, but had it done so it could have raised the potential issue of election between the common law and statutory causes of action. The Court of Appeal has confirmed that the statutory provision is an affirmation of the common law action.

20.62 The Court of Appeal cited with approval (at [9]) Lord Diplock's analysis in delivering the advice of the Privy Council in *T Mahesan v Malaysian Government Officers' Co-operative Housing Society* [1978] 1 MLJ 149, of the corresponding provision in the Malaysian Prevention of Corruption Act 1961 (No 42 of 1961) (referring to s 30 which is *in pari materia* with s 14 of the Singapore legislation), emphasising his statements to the effect that the equivalent of s 14(1) gave statutory recognition to the common law right of the principal to recover the amount of the bribe from either the briber or the bribed agent, and that the equivalent of s 14(2) preserved the right of the principal to recover from the bribed agent damages for fraud in respect of any loss in excess of the amount of the bribe. Hence, the statutory provisions did not affect the existing rights of the principal at common law.

20.63 On this view, there is *equivalence* and not *overlap* of causes of action. The principal may of course ignore the statute and proceed at common law. But if the principal sues under s 14(1), he is effectively claiming on the basis of his common law rights (in the broad sense including equitable rights) as recognised by the statute; the statute confirms those rights and clarifies that the orders made in the criminal proceedings will not bar the civil proceedings. Hence, there is in theory and practice no issue of election between a statutory cause of action on the one hand and a common law cause of action on the other. This is a welcome clarification of the law.

Double disgorgement

20.64 The Court of Appeal rejected the argument that there was double recovery as far as the employer was concerned. Reasoning from the basis that the employer clearly would have been able to recover the bribes from the agent at common law, it asked whether that right had been qualified by statute. The court concluded that the words of the statute were clear enough that the right was not so constrained, and that Parliament must have intended that double disgorgement could act as a further deterrence against corruption (*Leong Wai Kay v Carrefour*

Singapore Pte Ltd [2007] 3 SLR 78, at [14]). The civil proceedings and the criminal proceedings were clearly distinct.

20.65 The Court of Appeal also relied on *T Mahesan v Malaysian Government Officers' Co-operative Housing Society* [1978] 1 MLJ 149 (above, at para 20.52). The court noted that the Privy Council in that case had prevented the Federal Court from allowing effectively *treble* recovery. This was because the Federal Court had allowed the plaintiff in that case to claim both in restitution and in tort, in addition to the penalty amounting to the sum of the bribe that the defendant had been ordered to pay the plaintiff (this last aspect of the Malaysian statute has no equivalent in the Singapore provisions). Instead, the Privy Council required the plaintiff to elect between the restitutionary and tortious claims. In doing so, the Court of Appeal of Singapore noted, Lord Diplock stated that the order in the criminal proceedings against the bribed agent had no effect on the civil rights of the principal against the agent.

20.66 As the High Court noted in the instant case (*Carrefour Singapore Pte Ltd v Leong Wai Kay* [2006] 4 SLR 412 at [7]), the Privy Council did not deal with the matter of the partial payment by the bribed agent in that case to the principal pursuant to the court order in the criminal proceedings. The Court of Appeal did not deal with the point either. Under Singapore law, there is no possibility of the penalty being ordered to be paid to the principal, so the issue does not arise squarely whether any payment to the principal ordered in criminal proceedings has to be taken into consideration in civil proceedings in determining the quantum of restitutionary recovery or the quantum of loss should the plaintiff elect to claim for tortious damages. There is no question of a windfall for the plaintiff.

20.67 As noted in the previous issue, there remains a theoretical issue whether the common law restitutionary claim (assuming that it is not based on compensation) is based on deterrence or the prevention of unjust enrichment ((2006) 7 SAL Ann Rev 397 at paras 20.13–20.15). The issue is not wholly without practical effect, as the defendant may in other cases also plead that there is no unjust enrichment to be reversed as a result of criminal proceedings, *eg*, where profits of a breach of contract or fiduciary amounting also to a crime have been confiscated by the state.

20.68 In underscoring that the principle of "double disgorgement" is a prominent landmark in the anti-corruption landscape of Singapore (*Leong Wai Kay v Carrefour Singapore Pte Ltd* [2007] 3 SLR 78 at [14]), the approach of the Court of Appeal rests the claim squarely on civil deterrence *in this case*. This decision says nothing about the claim for restitution for wrongs generally, assuming that it is a coherent category

of claims in the first place. The overlap between the civil deterrence inherent in at least some of these claims and civil deterrence generally in tort (and in some countries, contract) claims as well as criminal deterrence, remains a thorn on the side of private law. But this was not the forum to resolve this broader issue, as the court found the answer within the statutory framework of the Prevention of Corruption Act.

20.69 It may be asked, if the public policy against corruption is so strong, whether the civil remedies (restitution and compensation) should be made cumulative as well. There are, however, two different issues: double recovery and double disgorgement. The policy against double recovery by the plaintiff was not operational on the facts because the penalty (unlike in *T Mahesan v Malaysian Government Officers' Co-operative Housing Society* [1978] 1 MLJ 149 ("*Mahesan*")) went to the state and the plaintiff did not seek recovery under the law of torts. On the authority of the *Mahesan* case, this policy remains unaffected by the statute, and nothing in the Singapore Court of Appeal's judgment suggests anything to the contrary. On the other hand, whatever the common law's position may be on double disgorgement, it was overshadowed on the facts by the statutory policy of deterrence which was determinative of the results in the case. It is difficult to see that there can be a unified common law principle on double disgorgement. Much is likely to depend on the nature of the wrong and the circumstances of the case.

Defences

Change of position

20.70 In *Comboni Vincenzo v Shankar's Emporium (Pte) Ltd* [2007] 2 SLR 1020 (facts summarised in para 20.44 above), another issue that the court dealt with, albeit by way of observation only, was the change of position defence. The court adopted the oft-quoted formula in *Lipkin Gorman v Karpnale Ltd* [1991] 2 AC 548 at 579 that the defence will apply when the injustice of ordering an innocent defendant whose position has changed to repay or to repay in full outweighs the injustice of denying the plaintiff restitution, and the qualification that the defence is limited to defendants receiving benefits in good faith (at [70]–[73]).

20.71 The court did not consider whether the defence applied on the facts. According to the court, the defendant could rely on the defence if it had been found to be a constructive trustee, and as the defendant was not found to be one, the defence was inapplicable (at [73]). Four comments may be made.

20.72 Firstly, it is not clear how hard the plaintiff had pushed the claim for mistaken payment under common law. The claim was pushed hard enough for the court to consider the defence of assumption of risk (or waiver of inquiry), but apparently not hard enough for the court to consider the defence of change of position. If the common law claim had been pushed hard enough, and in the absence of a *bona fide* purchaser for value without notice defence being argued (there is no evidence of this in the law report), liability of the defendant for the full sums received being strict, the change of position defence would have been highly relevant.

20.73 Secondly, it is ambiguous whether the court was referring to the defendant being a potential constructive trustee in the sense of being a real trustee over actual property (a remedial constructive trust having been argued), or being personally potentially liable for the receipt of money as if it were a constructive trustee (no trust over actual property). Given the way the claims were run and the tenor of the judgment, it would appear that the personal liability for knowing receipt dominated the trial and the judgment. The court was most likely concerned with the personal liability of the defendant. It is therefore not safe to regard the dictum as authority either way for the applicability of the change of position where the defendant is sought to be made a remedial constructive trustee over actual property.

20.74 Lord Millett has clarified that the change of position defence does not apply if all that the plaintiff is doing is to ask for his property back (*Foskett v McKeown* [2001] 1 AC 102 at 129). In a real sense, this is what the plaintiff was doing if all he did was ask for the property in the hands of the defendant on the basis that the defendant was a remedial constructive trustee. However, the reason for the existence of the property claim in the first place should not be overlooked. This marks the difference between the remedial constructive trust as recognised in Singapore (which reverses an unjust enrichment) and the institutional trust recognised in *Foskett v McKeown* as the result of the tracing of property. In principle, the change of position defence ought to be applicable where a remedial constructive trust is imposed to reverse unjust enrichment; the principle in *Lipkin Gorman v Karpnale Ltd* [1991] 2 AC 548 calling for the balance of injustice applies with greater force if the innocent defendant is being asked to transfer property. But the present case was not the forum to test this principle. (See, however, paras 20.77–20.79 below).

20.75 Thirdly, the proposition that the change of position defence (at least the version in *Lipkin Gorman v Karpnale Ltd* [1991] 2 AC 548) is applicable if the defendant had been found to be personally liable as a constructive trustee presupposes that the basis of this equitable claim is the reversal of an unjust enrichment. It is far from clear under the

current state of the law that the liability of a knowing recipient is based on the law of unjust enrichment. The Australian court has resisted this approach (*Say-Dee Pty Ltd v Farah Construction Pty Ltd* [2007] HCA 22), although there is some *obiter* support from English cases (*Dubai Aluminium Co Ltd v Salaam* [2002] 3 WLR 1913; [2002] UKHL 48 at [87]; *Twinsectra v Yardley* [2002] 2 AC 164; [2002] UKHL 12 at [105]; *Royal Brunei Airlines Sdn Bhd v Tan* [1995] 2 AC 378 at 386). On the approach of the court in the present case, there is at least a restitutionary dimension in so far as the claim is based on the alleged remedial constructive trust which is calculated to reverse an unjust enrichment. Given this special feature of the case, the proposition in the case provides no general guideline on the general applicability of the change of position defence to liability for knowing receipt of property in breach of trust or fiduciary duty.

20.76 Fourthly, on the reasoning of the court that want of probity is the test for making the defendant a constructive trustee (whether in the personal or (remedial) proprietary sense), it is difficult to see when the change of position, which as a matter of hypothesis only applies if the defendant had acted in good faith, can ever apply to the liability of a constructive trustee. It should not be assumed that the law of restitution consists of a class of homogeneous claims, and it may be that the change of position defence may not be applicable to some restitutionary claims (see also (2002) 3 SAL Ann Rev 345 at paras 19.77–19.78).

Change of circumstances?

20.77 The final point of interest in *Comboni Vincenzo v Shankar's Emporium (Pte) Ltd* [2007] 2 SLR 1020 arose from the argument by the defendant that it did not have to return the remaining sum of money in its hands, on the basis that it wanted to use it to offset the claims that it will be making against L. The court's response was that the defendant "cannot retain the sum *unless there are proper grounds which excuse it* from doing that" [emphasis added]. On the facts, the court found that the defendant had no right to use the plaintff's money to satisfy its claims against L. It remains to be seen what could amount to proper grounds that could excuse the defendant from returning the money.

20.78 The starting point is that the restitutionary defence of change of position is not applicable in a proprietary claim that is not seeking to reverse unjust enrichment but merely seeks the return of property (see para 20.74 above). The claim to the remaining sum was not founded on the remedial constructive trust. However, the property regime can be harsh on the defendant without some kind of change of circumstances defence (see J D Davies, "Equity in English Law" in *Equity in the World's Legal Systems* (R A Newman ed) (Bruylant, 1973) at p 181). Take the case of a recipient who has the requisite knowledge of an antecedent

fraud on the plaintiff. However, the defendant is himself quickly defrauded of the money, or perhaps an event occurs which wipes out the assets (*eg*, theft, insolvency of a bank, stock market movements, *etc*). It seems rather harsh that the defendant, especially if he had not done anything to demonstrate that he had appropriated the assets to his own use, should have to be held, as a trustee, to be accountable for those assets or their value.

20.79 This could be a signal from the Singapore judiciary to move away from the intransigent refusal of English law to recognise a change of circumstances defence in proprietary claims. If developed (and something can be said for that), it will be the counterpart to the change of position defence applicable to restitutionary claims.

Choice of law

20.80 *Rickshaw Investments Ltd v Nicolai Baron von Uexkull* [2007] 1 SLR 377 (CA) is not a case on the law of restitution as such, but it is, nevertheless, significant for the law of restitution in so far as it decided that claims which are founded on equitable principles, like claims based on breaches of fiduciary duties and breaches of confidence, are, if the equitable liability arises from a recognised legal relationship like contract or tort, subject to the law governing the underlying legal relationship. This was a significant contribution by the Singapore Court of Appeal to the scarce Commonwealth jurisprudence on a growing and important subject.

20.81 However, it does create some uncertainty about the right choice of law rule to apply if the plaintiff is claiming an account of profits for breach of fiduciary duty arising from a legal relationship created by contract. On the reasoning in *Kartika Ratna Thahir v PT Pertambangan Minyak dan Gas Bumi Negara (Pertamina)* [1994] 3 SLR 257 (CA) that a claim for an account of profits based on a breach of fiduciary duty is not a contractual claim, such a claim will be governed by the law of the place of enrichment. *Rickshaw Investments Ltd v Nicolai Baron von Uexkull* [2007] 1 SLR 377 (CA) ("*Rickshaw*"), however, suggests that this type of claim should be governed by the law of the underlying contract, not because the breach of fiduciary duty claim is contractual in domestic law, but because the fiduciary obligation arises from a factual matrix that is already regulated by a pre-existing contractual relationship. It is suggested that the latter line of reasoning is the more persuasive one. Although the *Rickshaw* case was not dealing with a claim for restitution to reverse an unjust enrichment but with compensation for breach of fiduciary duty, this is not a convincing legal distinction to make.

20.82 In *Rabiah Bee bte Mohamed Ibrahim v Salem Ibrahim* [2007] 2 SLR 655 (facts summarised above at para 20.3), various allegations were made of breaches of fiduciary duties arising from a joint-venture agreement entered into in Singapore to use various holding companies (incorporated in the British Virgin Islands and the Republic of Seychelles) to purchase and refurbish property in England for the purpose of further resale or rental. The plaintiff was resident in England and took action to purchase various properties there pursuant to the joint venture agreement. The defendant was a solicitor resident in Singapore. The various claims based on breaches of fiduciary duties, including a claim for account of profits, were determined according to Singapore law, but no foreign law was argued in the case. There appeared to be very strong foreign elements in the case. Practically, however, it would probably not have made any difference as the only realistic foreign law candidate for the law governing the joint venture agreement was English law, and it is unlikely to be found to be different from Singapore law in this respect.